
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ANTONIO TAPIA-CORONA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21066

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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FILED

AUG 31 1966

WM. B. LUCK, CLERK



NOV 4 1966



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I.

JURISDICTIONAL STATEMENT OF FACTS

This case was commenced by the return of an Indictment on July 29, 1965 by the Federal Grand Jury sitting at Phoenix, Arizona (Transcript of the Record, volume one, item nineteen. Hereinafter volume one of the Transcript of the Record will be referred to as "RC," the Transcript of the testimony at the three hearings will be referred to as follows: the transcript of the hearing on the Motion to Suppress as M-TR, the number following will refer to the page number, and the

number following "L" will refer to the line number. The transcript of the November 8, 1965 proceeding will be referred to as 11-8-65 TR, the number following will refer to the page number, etc. The transcript of the hearing on November 9, 1965 will be referred to as 11-9-65 TR, the number following will refer to the page number, etc. The transcript of the trial will be referred to as TR, the number following will refer to the page number, etc.)

The Indictment charged the Appellant Antonio Tapia-Corona (the appellant will be referred to hereafter as "Corona") and two others, Rodolfo Lopez-Gonzales and Jesus Reyes-Carranza with unlawfully, wilfully and knowingly, and with intent to defraud the U. S. of A., smuggling and clandestinely introducing into the United States of America at Nogales, State and District of Arizona approximately one hundred (100) pounds of bulk marijuana, which should have been invoiced, all in violation of 21 U.S.C. 176a (RC Item 2).

On September 13, 1965 (there was no judge available at Tucson, Arizona during the month of August, 1965) Corona was to have been arraigned, and Corona asked for a continuance to obtain counsel (RC Item 19). On September 27, 1965, Corona was present with his counsel George M. Sheets and pleaded not guilty; Corona's counsel asked for twenty days to file motions directed to the Indictment and it was granted (RC Item 19).

On September 29, 1965 the Court set the case for trial on November 9, 1965 (RC Item 19).

On October 11, 1965, Corona by counsel filed a Motion for a Bill of Particulars as to the exact time and place at which the alleged crime was committed, the name and address of each and every person present at the time of the commission of the alleged offense, the facts and circumstances which the

Government will attempt to prove as parts of the alleged crime (RC Item 3). Mr. Sheets, attorney for Corona filed an Affidavit in support of the Motion alleging he and his client were without sufficient facts to prepare his defense, prevent surprise or make claim for double jeopardy (RC Item 4).

On October 13, 1965, the Government filed a Memorandum in Opposition (RC Item 5). On October 18, 1965 a hearing was had and the motion was denied (RC Item 19).

On November 1, 1965 Corona by his counsel filed a Motion to Suppress and to disclose identity of informers, on the grounds as stated by counsel that Corona "was not knowingly involved in any negotiations of any nature for the importation of marijuana or its sale. For the purpose of setting up the defense of entrapment of innocent persons (this defendant). For the purpose of acquiring positive testimony by any informer that this defendant was not in fact the individual who was responsible for importing the marijuana into the United States." (RC Item 6 pp 1-2)

(Separate motions to suppress by the other two defendants were filed on October 29, 1965. They are not included as part of the record.) The appellee filed a Memorandum in Opposition on November 1, 1965 which incorporated the Government's memorandum in opposition to their motions by reference. The Memorandum asserted border search and that since it was a border search, the request for disclosure of the name of the informer was without merit (RC Item 7).

The hearing was held on November 2, 1965 (RC Item 19).

The testimony of Charles Cameron and Randolph Aros was taken by the three defendants' counsel with the three

defendants present including Corona and an interpreter (M-TR 2-13).

The Court ordered the appellee to furnish to the Court, for in camera consideration, a statement of everything "Henry" had to do with this case, or any other person who furnished information to the Government who would be described as an informer (RC Item 19).

On November 4, 1965 the Government filed written notice and mailed copies to all three defense counsel that it would disclose the identity of the informer in Judge Walsh's chambers at 9:15 A.M. on November 8, 1965. (This notice was filed with the Court and was not entered on the docket sheet, item 19 of RC.)

The disclosure was made at the time and place noticed and the Government stated the full name of the informant, Henry Calcedo and that his present whereabouts were unknown and that the Customs Agency had spent all week looking for Henry Calcedo and that he should be coming into the United States since he had been paroled "into Mexico" (11-8-65 TR 2 L 4-15). This confusion on the part of this attorney was corrected at 1:00 P.M. 11-8-65 TR 5 L 4-9 i.e. that permission to parole Henry Calcedo, a Mexican alien, into the United States.) The Government had not intended to call Henry Calcedo as a witness (11-8-65 TR 4-L 15-17). Also, it was stated that there were two contacts with Henry Calcedo and the Government agents on November 19 and on the 20th and all that was stated by Henry Calcedo was that Henry Calcedo had some persons, some individuals from down south who had 100 kilos of marijuana to sell and wanted an American buyer (11-8-65 TR 3 L 19-4 L 5). The Court set a hearing at 1:00 P.M. for the continuance motions. Nothing new had been learned about the whereabouts of Henry Calcedo (11-8-65 TR 5). The Court instructed the

Government to do everything possible to produce this man for the trial and continued the trial to November 10, 1965. (11-8-65 TR 5 L 22 to 6 L 6).

The Government also arranged to have an agent show defense counsel where the marijuana was found (11-18-65 TR 7 L 2-3).

On November 9, 1965, the Court asked the Government to report on its efforts to find Henry Calcedo. At the hearing the testimony of Henry Washington was taken (11-9-65 TR 2-13). He testified he had been asked one week ago to find Henry Calcedo (11-9-65 TR 3 L 8-10). He had gone to all the places Calcedo had previously lived—Calcedo had always rented rooms as long as Washington had known him—Washington talked to people who knew him. He asked the Inspectors at the Port at Nogales to let him know if they saw him. He placed the requests at other Ports of Entry. Washington had looked for him at places where he would be and no one had seen him. He could not swear he had seen him on Friday evening (November 5, 1965). He thought he had seen him but by the time he could turn his car around and get back, he could not find him. He spent two hours looking for him there (11-9-65 TR 3-4).

On Monday evening (November 8, 1965) Washington received a report from a man he knew that there was a man in town reported to be the brother of one of the defendants who was "offering a 50,000 pesos reward for anybody that would get Calcedo." (11-9-65 TR 4 L 15-18). Other than that he had not heard anything. On cross-examination by the three defense attorneys it was brought out that with the one exception of Friday when he may have seen him, Washington had not seen Calcedo for three weeks; that Calcedo was a Mexican national and had no family that he knew of in Mexico;

that he had gone into Mexico every night in the last week, specifically looking for him and once during the day; that he had gone at least twice to the three different places he had rooms and that in his opinion, when asked by defense counsel, Henry Calcedo was afraid because there was a price on his head. He was also asked if he had reason to believe if Calcedo would not return to Nogales. He replied he had no reason to believe he was in Nogales. He was then asked if Henry Calcedo had been informed by any agent that his name had been revealed and the Court ruled that the attorney was arguing with the witness (11-9-65 TR 4-13).

Trial was held on November 10, 1965, November 12, 1965 and November 15, 1965. Corona during all the trial and at the sentencing had the interpreter at the counsel table, except when the defendants testified. Corona was found guilty by the jury and the other two defendants were acquitted (RC Item 19).

On November 17, 1965, Corona by his attorney filed a motion in arrest of judgment or for a new trial on the ground that no acts of Corona in the United States had been proved; that the informer had not been produced; that his statements as to what occurred in Mexico had not been controverted and that he was handicapped since the testimony of Cameron "repeated by the prosecutor through the interpreter was sorely limited." (RC Item 10). The Motion was denied on November 22, 1965, and Corona was adjudged guilty and sentenced to fifteen years (RC Items 12 and 19).

Corona then filed Notice of Appeal together with two separate affidavits to appeal in forma pauperis. The first one alleged he had property in Mexico he couldn't liquidate and the second one alleged he didn't (RC Items 14 and 15).

The Court granted leave to appeal in forma pauperis

on March 4, 1966 (RC Item 16).

This is an appeal pursuant to 28 U.S.C. 1291.

II. STATEMENT OF FACTS

On July 19, 1965 Customs Agent Randolph Aros was visited by Henry Calcedo who asked for Cameron and then Washington. He stated there were some men from the south who had a large quantity of marijuana to sell. Aros arranged to have Calcedo come back the next day (TR 31-32). Cameron returned and met with Calcedo on July 20, 1965 (TR 32-33).

On July 21, 1965 at 3:00 P.M. Charles Cameron met Corona and Henry Calcedo at the Safeway parking lot next to the International Boundary line in Nogales, Arizona. They were observed by Agents Aros and Horace Cavitt (TR 32-35; 211; 303-304). Cameron testified he speaks and understands Spanish and spoke to Corona in Spanish (TR 304). Henry introduced Cameron to Corona and Cameron gave his name as David (TR 305). Cameron told Corona he understood he had 100 kilos of marijuana. Corona stated he did and asked Cameron if he could buy it. Cameron stated he could only handle 30 kilos at \$50.00 a kilo and then agreed to buy 50 kilos (TR 306-307).

On Thursday, July 22, 1965 Cameron met Henry and Corona again at the same place (TR 308), again observed by Agent Aros (TR 36), and Cavitt (TR 211) and by Vincent Durant (TR 143). Cameron drove them out on the Tucson Highway about four miles, across from the Flagstone Motel followed by Aros (TR 309; 37). Corona asked Henry to deliver and Henry told him that all Corona asked him

(Henry) for was an American buyer and he had found him an American buyer and he, Henry, was not going to deliver (TR 309). Corona said he knew a man who would deliver and asked to meet Cameron at 5:30 P.M. (TR 310).

At 5:30 P.M. Cameron met Corona who was accompanied by a tall thin man wearing a hat. This meeting occurred at the Safeway parking lot (TR 310) and was again observed by Aros (TR 38) and Cavitt (TR 211). Cameron again drove them out on the highway followed by Aros (TR 39) but the new man did not like the delivery spot (TR 311). They returned to town and the new man showed them a spot along the Border (TR 311). Cameron objected that it was too well lit and too close to houses (TR 311-312). However Cameron agreed to accept delivery there and to meet at 11:00 P.M. that evening at the Safeway lot (TR 312).

Cameron met Corona and the new man at 11:00 P.M. He was told by Corona that the place was too well lit and was asked to take delivery farther west and a little north (TR 313). Cavitt, Searcy, Donovan, Aros and Durant were waiting at the point of delivery (TR 42; 146).

Cameron refused to have a change in the delivery point and Corona agreed to meet him Friday, July 23, 1965 at 10:00 A.M. (TR 314).

Cameron met Corona on Friday, July 23, 1965 at 10:00 A.M. and drove west of town and Corona gave alternate roads to take (TR 314 L 24-25).

They drove west on the American side opposite to where there was a house on a hill on the Mexican side and Corona told Cameron the marijuana was in that house (TR 315). Corona offered to deliver it to him there and at that time. Cameron asked for delivery that night at 9:00 P.M. (TR

315-316). They arranged to meet at the Safeway lot at 9:00 P.M. (TR 316 L 13-17).

Cameron showed the delivery spot to Aros after he left Corona off (TR 53 L 12-15).

That evening about 8:00 P.M. Agents Aros, Cavitt, Donovan, Searcy and Durant went to the delivery spot and hid themselves on a knoll nearby (TR 56-58; 213; 180; 256; 147). They heard noises coming from across the border, heard some thuds. In a little while, they saw two people, bent as if they were carrying heavy loads, pass by the knoll in the direction of the delivery spot. These two men were placed under arrest. The agents hid themselves again and awaited the arrival of Cameron and Corona (TR 59-63; 213-217; 180-186; 256-260; 147-155).

Cameron picked up Corona at the Safeway lot at 9:00 P.M. and proceeded to the delivery spot (TR 316 L 17-21). On the way to the delivery spot Corona offered him the keys to the three suitcases that contained the marijuana but Cameron refused them (TR 317-318). When they arrived at the delivery spot Cameron saw an object to his left and backed the car to where there were three suitcases. He turned the car toward Nogales (TR 318). They got out. Cameron was opening the trunk, while Corona walked over to the suitcases and was placed under arrest (TR 319). Cameron recognized Lopez-Gonzales that evening as having passed his car in the Safeway parking lot Thursday afternoon at 5:30 P.M. (TR 321).

Corona testified through the interpreter (TR 367 L 7-16) that he met Henry Calcedo as a taxi driver whom he asked to drive him to the hotel (TR 368 L 23-25). They discussed why Corona was there and that he, Corona, was in need

of money, and Calcedo told him how he could earn money by delivering objects of art (TR 369). Calcedo told him he would introduce Corona to a man whom the art objects were to be delivered (TR 369 L-13-25).

Corona testified he first heard marijuana when he met the American (TR 370 L 5-8). When they returned to Mexico Calcedo threatened to kill him if he, Corona, didn't return to the United States (TR 370 L 21-25).

Corona testified he first learned Cameron was a Customs Agent the next day (TR 371 L 2-7). Corona testified that Calcedo (sic) objected to delivering in a lighted area the day before it was delivered (TR 371 L 8-15).

Corona denied telling Cameron he had 50 kilos of marijuana to sell, or that he had brought the 50 kilos up from the south, or that he had an attorney in Tucson he normally sold to (TR 374). He testified he met Cameron the day following the evening he had met Henry Calcedo (TR 375 L 8-12). He then stated he, Corona, had arrived in Nogales the morning of the day he met Calcedo (TR 377 L 11-16). He did not recall hearing Calcedo refuse to deliver when he was out on the highway with Cameron (TR 381 L 10-13). Corona denied Cameron told him the deal was off at 11:00 P.M. on Thursday night (TR 386 L 19-22). Corona denied pointing out the man in the white shirt the next day (TR 387). Corona then admitted he did not know Cameron was a Customs Agent (TR 388 L 21-23). Corona testified he couldn't remember if he told Randolph Aros that he didn't know Cameron and that he had been paid \$10.00 to retrieve the suitcases (TR 389 L 8-11). He denied telling Aros he didn't know what was in the suitcases (TR 389 L 12-14 see Aros TR 79 L 8-24).

The other two defendants testified they were merely jump-

ing the fence (TR 400; 432-433) and that they did not know Corona (TR 405 L 7-8; 435 L 23-24).

III.

OPPOSITION SPECIFICATION OF ERRORS RELIED ON

1. There was no error in denying Corona's Motion for Judgment of Acquittal at the close of the evidence based on the alleged insufficiency of evidence;

2. There was no error in denying Corona's Motion for Judgment of Acquittal at the close of the evidence based on the Appellee's failure to produce Henry Calcedo;

3. There was no error in denying Corona's Motion for a Bill of Particulars.

IV.

SUMMARY OF ARGUMENT

1. The evidence of the smuggling and the acts of Corona in procuring the commission of the offense were sufficient to let the case go to the jury.

2. The Appellee used more than reasonable efforts to find Henry Calcedo, and the failure to produce Henry Calcedo was not through the fault of the Appellee.

3. The Motion for Bill of Particulars being based on the affidavit of Corona's counsel which alleged that Corona was without sufficient facts to prepare a defense, prevent surprise or making claim for double jeopardy were generalized statements and did not show sufficient grounds for the granting of the Motion.

V. ARGUMENT

1. The evidence of the smuggling and the acts of Corona in procuring the commission of the offense were sufficient to let the case go to the jury.

The appellee offered the testimony of Charles Cameron who saw the delivery spot at 10:00 A.M. and at about 3:00 P.M. (by Aros testimony TR 53-55) on Friday, July 23, 1965 and the suitcases with the marijuana were not there (TR 315). Cameron testified further that Corona told him on Friday evening, when he was driving him to the delivery spot that Corona was up to 2:30 or 3:00 that morning getting the marijuana back into Mexico when Cameron didn't want to accept delivery, Thursday night at 11:00 P.M.; Corona went on to say that the marijuana was safe from the water and that he had

packed it in suitcases (TR 317), Cameron testified that that morning Corona had told him the marijuana was in the house on the hill in Mexico and that his man was guarding it (TR 315).

The marijuana was not at the delivery point when Durant walked through there at about 8:00 P.M. on Friday evening when all the agents went to hide themselves (TR 167 L 15-19 and 168 L 4-7).

It is respectfully submitted there was sufficient evidence to find Corona guilty of aiding and abetting and procuring the commission of the offense of smuggling.

2. The appellee used more than reasonable efforts to find Henry Calcedo, and the failure to

produce Henry Calcedo was not through the fault of the appellee.

At the hearing of the Motion to Suppress on November 2, 1965, Charles Cameron testified Henry introduced him to Corona (MTR 12 L 13-17). On November 8, 1965 at a hearing this attorney disclosed the full name of the informer, and that the agents had been looking for Henry Calcedo for a week (11-8-65 TR 2 L 4-15).

On November 9, 1965 the testimony of Henry Washington was taken as to the efforts by the Government to find Henry Calcedo (11-9-65 TR 4-13. See also Jurisdictional Statement of Facts). The Court advised Corona's attorney that to that point he had made no showing as to what Calcedo would testify to if produced (11-9-65 TR 14 L 1-3).

On Friday, November 12, 1965, Corona's attorney had asked to have Henry Washington available at 3:30 P.M. and he was there. At 4:30 P.M. appellee's attorney reported Washington was outside, the Courtroom, called there by Corona's attorney, that he was still looking and had been unable to find Henry Calcedo, and offered to bring him in the Courtroom (TR 365 L 20-25). The Court said it was unnecessary to bring Washington in and have him report personally unless the defense wanted him to and Corona's counsel replied he did not (TR 366 L 1-6).

On Monday, November 15, 1965, at 1:00 P.M. the appellee's attorney reported that the Government was still unable to locate Henry Calcedo and that Washington received some more information that Tapia's brother and Onesimo's son were looking for him (TR 445 L 10-13).

In Velarde-Villarreal v. U.S., (9th Cir. 1965) 354 F. 2d 9, this Court stated at p. 13:

"We think that here is a special case in which the Government should be required to demonstrate its inability through reasonable efforts to produce Margarito."

In that case the defendant testified Margarito had made repeated calls on him to participate and the defendant had finally succumbed. Further the Customs agents were not ordered to look for Margarito nor did they testify they had looked for him. The rule appellant refers to in this case is set out in the concurring and dissenting opinion of Judge Pope beginning at p. 13.

In *U. S. v. Cimino* (2nd Cir., 1963) 321 F. 2d 509 at p. 512, it was stated:

" . . . No case of which we are aware has held that mere failure of production is reversible error, where diligent search for the special employee has been made. *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L. Ed. 2d 639, requires only that the Government identify its informant; the duty does not extend to production, *Williams v. United States*, 9 Cir., 273 F. 2d 781, 795-796, cert. denied 362 U.S. 951, 80 S.Ct. 862, 4 L.Ed.2d 868; *Eberhart v. United States*, 9 Cir., 262 F.2d 421, 422. There was no error in proceeding to trial without the missing witness. The granting of a continuance is a matter of discretion, see, e.g., *Smith v. United States*, 10 Cir. 273 F. 2d 462, 466, cert. denied 363 U.S. 846, 80 S.Ct. 1619, 4 L.Ed.2d 1729. We see no abuse of discretion in denial of the continuance."

It is respectfully submitted that the Government had used more than reasonable efforts in trying to find Henry Calcedo.

3. The Motion for Bill of Particulars being

based on the affidavit of Corona's counsel which alleged that Corona was without sufficient facts to prepare a defense, prevent surprise or make claim for double jeopardy were generalized statements and did not show sufficient grounds for the granting of the Motion.

In Appellant's Opening Brief at pages 14 and 15 it is alleged:

"Therefore it is elemental that preparation of an adequate and convincing defense would only be possible if opportunity were available to counsel to interview the witness prior to trial in order to overcome in advance the worse of the effects of surprise which occurred when the officer's testimony conflicted with that of defendant in so contrasting a manner."

It is respectfully submitted Corona was not entitled to the exact time and place at which the crime was committed, the names and addresses of each and every person who was present at the time of the commission of the "criminal acts" and the facts and circumstances which the Government will attempt to prove as parts of the alleged crime.

Furthermore, Corona was confronted with Charles Cameron at the hearing of the Motion to Suppress on November 2, 1965 (MTR 2 L 6-7 and 15). The first attorney to cross-examine Charles Cameron was Rodolfo Lopez-Gonzales' attorney William Netherton who asked Cameron, "Who is David Charles?" and Cameron answered, "That is myself in an assumed name." (M TR 13 L 22 and 25)

Where else did the knowledge of the assumed name of Cameron come from if not from Corona?

To seek who was present at the time of the offense is to seek indirectly what cannot be obtained directly, i.e., the list of the Government's witnesses. *Rodello v. U.S.* (9th Cir., 1960) 286 F. 2d 306, 310. Nor is it the purpose of a bill of particulars to give the defense the Government's case. *Rodello v. U.S.*, *supra*.

It is respectfully submitted the Motion for Bill of Particulars was properly denied.

VI. CONCLUSION

There was sufficient evidence of the commission of the offense of smuggling of marijuana; and of Corona's aiding, abetting and procuring the commission of the offense; and the Government having made more than reasonable efforts to find and produce Henry Calcedo. There was no error in the Government failing to produce him, and the Motion for Bill of Particulars was properly denied.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States

Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of the within Brief of Appellee mailed this
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